

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DONALD L. JONES,
Plaintiff,

Civil No. 05-382-AA
OPINION AND ORDER

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant.

Defendant.

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AIKEN, Judge:

Claimant, Donald Jones, brings this action pursuant to the Social Security Act (the Act), 42 U.S.C. §§ 405(g), 1383(c)(3), to

1 obtain judicial review of a final decision of the Commissioner.
2 The Commissioner denied plaintiff's application for Disability
3 Insurance Benefits (DIB) under Title II of the Social Security
4 Act. Id. For the reasons set forth below, the Commissioner's
5 decision is reversed and remanded for payment of benefits.

6 **PROCEDURAL BACKGROUND**

7 Plaintiff protectively filed his application for DIB in
8 April 2002. Tr. 61-63. He alleged an inability to work
9 beginning September 16, 2001, due to a variety of health issues
10 including depression and post-traumatic stress disorder after
11 serving two tours in Viet Nam. After plaintiff's applications
12 were denied initially, and upon reconsideration, on May 16, 2003,
13 plaintiff filed a timely request for hearing. Tr. 16. On
14 December 6, 2004, after a hearing, the Administrative Law Judge
15 (ALJ) ruled that plaintiff was not disabled and could return to
16 his past relevant work. Tr. 16-25. The Appeals Council denied
17 plaintiff's request for review. Tr. 5-7. The ALJ's decision thus
18 became the final agency decision. See 20 C.F.R. §§ 404.981,
19 416.1481, 422.210 (2005).

20 **STATEMENT OF THE FACTS**

21 Plaintiff was born on September 2, 1948. Tr. 144. He was
22 53 years old when he stopped working on September 18, 2001, and
23 56 years old at the time of the hearing. Tr. 463. Plaintiff has
24 a high school education plus two years of college. Tr. 87.
25 Plaintiff has been married to his wife for approximately 26
26 years, and they have two grown sons. Tr. 133, 464.

27 Plaintiff served in the U.S. Army from May 8, 1967, to
28 April 30, 1970, including two tours of duty in Viet Nam. Tr. 61,

1 188, 313. During his first tour plaintiff was assigned to the
2 173rd Airborne and fought in the battle at Dak To where was one of
3 22 soldiers out of 200 that were not killed or wounded. Tr. 188.
4 Plaintiff was ultimately wounded during his second tour of duty
5 and received a purple heart. Tr. 137. In January 1999,
6 plaintiff sought assistance from a VA counselor for anger
7 problems. Tr. 188. In March 1999, plaintiff was diagnosed with
8 Post Traumatic Stress Disorder and Major Depression. Tr. 138.

9 Ron Williams, plaintiff's supervisor with the City of Salem
10 where plaintiff worked as a traffic control technician/supervisor
11 until June 18, 2001, prepared a memo dated June 26, 2001, stating
12 that plaintiff had become very antisocial and withdrawn in his
13 dealing with other employees, which was not acceptable due to his
14 position as a supervisor. Tr. 130. Williams also noted that
15 plaintiff missed work at least one to two days a week over the
16 last year of his employment and was demonstrating poor judgment.
17 Id.

18 Plaintiff's wife also prepared a written statement dated
19 July 28, 2004, noting that plaintiff had not been dealing well
20 with stress. This had caused several problems, including no
21 coping skills by the end of a routine work day; no energy or
22 interest in doing any extra curricular activities; insisting on
23 isolating himself and missing a lot of work - at least 1 day a
24 week and sometimes more. Tr. 133. She also said that plaintiff
25 has a difficult time waking up in the morning and getting out of
26 bed, he is always tired, and has a difficult time remaining
27 interested in his work even though he "really enjoys the work,
28 duties and people." Id.

1 Plaintiff's wife stated that she frequently has to remind
2 plaintiff to shower, shave and brush his teeth. Tr. 134.
3 Plaintiff has two broken teeth that he hasn't bothered to get
4 repaired for over a year, and plaintiff has frequent mood swings.
5 Id.

6 Plaintiff testified at the hearing that he routinely
7 isolates himself, even while at work. Tr. 464. He experienced
8 a difficult time dealing with people in his job. His temper
9 would flare and he was unable to be effective at work dealing
10 with coworkers and the public. Id. Plaintiff stated he had
11 frequent panic attacks and had to leave work to go home. Tr.
12 466. He would not leave his house for three or four days. Id.
13 Plaintiff testified that his temper would flare away from work,
14 for example, yelling at other drivers while on vacation ("road
15 rage"). Tr. 468. He also reported occasional verbal
16 altercations with his two immediate supervisors. Tr. 471.

17 On March 20, 2002, the VA awarded plaintiff a 100% service
18 connected disability. Tr. 156. The VA found that plaintiff was
19 "unable to secure or follow a substantially gainful occupation as
20 a result of service-connected disabilities" and "unable to
21 continue employment due to his posttraumatic stress disorder
22 symptoms." Tr. 155.

23 **STANDARD OF REVIEW**

24 This court must affirm the Secretary's decision if it is
25 based on proper legal standards and the findings are supported by
26 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
27 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
28 mere scintilla. It means such relevant evidence as a reasonable

1 mind might accept as adequate to support a conclusion."

2 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting

3 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).

4 The court must weigh "both the evidence that supports and

5 detracts from the Secretary's conclusions." Martinez v. Heckler,

6 807 F.2d 771, 772 (9th Cir. 1986).

7 The initial burden of proof rests upon the claimant to

8 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486

9 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate

10 an "inability to engage in any substantial gainful activity by

11 reason of any medically determinable physical or mental

12 impairment which can be expected . . . to last for a continuous

13 period of not less than 12 months. . . ." 42 U.S.C.

14 § 423(d)(1)(A).

15 The Secretary has established a five-step sequential

16 process for determining whether a person is disabled. Bowen v.

17 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,

18 416.920. First the Secretary determines whether a claimant is

19 engaged in "substantial gainful activity." If so, the claimant

20 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.

21 §§ 404.1520(b), 416.920(b).

22 In step two the Secretary determines whether the claimant

23 has a "medically severe impairment or combination of

24 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.

25 §§ 404.1520(c), 416.920(c). If not, the claimant is not

26 disabled.

27 In step three the Secretary determines whether the

28 impairment meets or equals "one of a number of listed impairments

1 that the Secretary acknowledges are so severe as to preclude
2 substantial gainful activity." Id.; see 20 C.F.R.
3 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
4 presumed disabled; if not, the Secretary proceeds to step four.
5 Yuckert, 482 U.S. at 141.

6 In step four the Secretary determines whether the claimant
7 can still perform "past relevant work." 20 C.F.R.
8 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
9 disabled. If she cannot perform past relevant work, the burden
10 shifts to the Secretary. In step five, the Secretary must
11 establish that the claimant can perform other work. Yuckert, 482
12 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
13 (f). If the Secretary meets this burden and proves that the
14 claimant is able to perform other work which exists in the
15 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
16 416.966.

17 **DISCUSSION**

18 Based on the 5-Step Sequential Process outlined above, the
19 ALJ found at Step One that plaintiff was not engaged in
20 "substantial gainful activity" since his alleged onset date of
21 disability. At Step Two, the ALJ found that plaintiff had
22 "severe" impairments. Findings by the ALJ at Steps One and Two
23 are not in dispute. At Step Three, the ALJ found that these
24 medically determinable impairments do not meet or equal one of
25 the listed impairments. This Finding is in dispute. The ALJ next
26 determined that plaintiff retained the residual functional
27 capacity for medium work, no heights, no climbing ladders, ropes,
28 or scaffolds, no highly technical decision making requiring close

1 interaction with supervisors, no highly stressful situations, no
2 production quotas, and inability to accept criticism or
3 suggestions from those in authority. See 20 C.F.R. §§
4 404.1520(e), 404.1545, 416.920(e), 416.945. This Finding is in
5 dispute. At Step Four, the ALJ found that plaintiff was able to
6 perform past relevant work as a "roofer, framer, and sawyer."
7 Tr. 24. This Finding is also in dispute.

8 Plaintiff alleges that the ALJ erred by disregarding the
9 United States Department of Veteran's Affairs (DVA) 100% service-
10 connected disability rating; the written statement from
11 plaintiff's wife; and the memo from plaintiff's supervisor and
12 payroll records from plaintiff's last employer. I agree and
13 reverse and remand the ALJ's decision for payment of benefits.

14 The defendant acknowledges that the ALJ considered some VA
15 records, however, the ALJ failed to explain the weight given to
16 the DVA Disability Rating. Tr. 18-20. Further, the defendant
17 acknowledges that the ALJ failed to address lay testimony. Tr.
18 130-34. The defendant, however, argues that these errors "could
19 be addressed with further proceedings," and requests that this
20 court remand the case back to the ALJ. Defendant's Memorandum in
21 Support of Remand, p. 4.

22 I disagree with the defendant that the record in this case
23 "remains ambiguous and undeveloped." Id. at p. 6. The court may
24 direct an award of benefits when, as here, the record has been
25 fully developed and further administrative proceedings would
26 serve no useful purpose. Smollen v. Chater, 80 F.3d 1273, 1292
27 (9th Cir. 1996). This is true when: (1) the ALJ has failed to
28 provide legally sufficient reasons for rejecting plaintiff's

1 evidence; (2) there are no outstanding issues that must be
2 resolved before a determination of disability can be made; and
3 (3) it is clear from the record that the ALJ would be required to
4 find the plaintiff disabled if he considered the plaintiff's
5 evidence. Id.; Rodriguez v. Bowen, 876 F.2d 759, 763 (9th Cir.
6 1989).

7 The record contains an August 16, 2001, Rating Decision
8 from the DVA granting plaintiff a 70% disability effective March
9, 2001. Tr. 152. The disability rating was based upon a
10 finding that: "The VA examination clearly demonstrates that the
11 veteran has deficiencies in the areas of work, family relations,
12 judgment, thinking and mood due to his symptoms of PTSD and major
13 depressive disorder. He suffered from suicidal and homicidal
14 ideation, impaired impulse control, neglect of personal
15 appearance and hygiene, difficultly in adapting to stressful
16 circumstances, and inability to establish and maintain effective
17 relationships." Tr. 152.

18 The record also contains a March 20, 2002, Rating Decision
19 from the DVA increasing plaintiff's disability rating to 100%
20 because "the claimant is unable to secure or follow a
21 substantially gainful occupation as the result of service-
22 connected disabilities. The veteran is unable to continue
23 employment due to his posttraumatic stress disorder symptoms."
24 Tr. 155.

25 Due to the "marked similarity between [the SSA and VA]
26 federal disability programs," and the identical governmental
27 purpose of providing benefits to those unable to work because of
28 a serious disability, a DVA disability rating is entitled to

1 "great weight" in a social security disability hearing and "must
2 be considered by the ALJ." McCartey v. Massanari, 299 F.3d 1072,
3 1075-76 (9th Cir. 2002) (ALJ erred in disregarding a 80% VA
4 disability rating, solely based on that error, court reversed and
5 remanded for award of benefits).

6 Although it is true that the ALJ generally "considered" the
7 VA medical records at issue here, tr. 18-20, the ALJ's decision
8 fails to disclose a single reference to the DVA 100% Disability
9 Rating, or any reason for failing to give the Rating "great
10 weight."

11 Similarly, the ALJ disregarded lay testimony and evidence
12 without comment. The record contains a June 26, 2001, memo from
13 Ron Williams, plaintiff's supervisor for five years at his last
14 employment. Tr. 130. This memo was prepared and considered by
15 the VA in determining plaintiff's 100% service-connected
16 disability rating based on plaintiff's unemployability. Tr. 154.
17 Williams' statement was supported by a statement from Bonnie
18 Irwin, Payroll Department, who confirms that plaintiff missed
19 work for 56 days from October 30, 2000, to June 23, 2001, an
20 average of approximately 7 days per month. Tr. 73-75.

21 Lay witness statements cannot be disregarded by the ALJ
22 without comment. Nguyen v. Chater, 100 F.3d 1462 (9th Cir. 1996).
23 If the ALJ wishes to discount evidence from lay witnesses, he
24 must provide reasons that are germane to each witness. Dodrill
25 v. Shalala, 12 F.3d 915 (9th Cir. 1993). The ALJ failed to
26 provide any reasons to discount the evidence provided by
27 Williams/Irwin.

28 Similarly, the record contains a July 28, 2004, written

1 statement from plaintiff's wife. As noted above, the statement
2 describes plaintiff's symptoms and limitations. The ALJ again
3 disregarded, without comment, plaintiff's wife's testimony
4 regarding plaintiff's fatigue, lack of interest, inability to
5 motivate himself, frequent absences from work, moodiness, anger,
6 and disinterest in his appearance and hygiene. See Sprague v.
7 Bowen, 812 F.2d 1226 (9th Cir. 1987) (disregard of lay evidence
8 violates Commissioner's regulations that he will consider
9 observations by nonmedical sources as to how impairments affect
10 plaintiff's ability to work).

11 Finally, the vocational expert testified that plaintiff's
12 frequent absences from work would prevent him from performing
13 both his past relevant work and any other work. Tr. 493-94. Dr.
14 Pati, a medical expert who testified at the hearing, found that
15 there is no evidence in the record that plaintiff's frequent
16 absences from work were due to his use of alcohol or marijuana.
17 Tr. 491.

18 The record is fully developed and I find no unresolved
19 issues requiring further proceedings. Therefore, giving "great
20 weight" to the DVA disability determination, and considering the
21 evidence provided by plaintiff's wife, and his former employer,
22 I find that plaintiff was disabled throughout the relevant
23 period.

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CONCLUSION

The Commissioner's decision is not based on substantial evidence, and is therefore, reversed and remanded for payment of benefits. Defendant's motion for remand for further proceedings (doc. 12) is denied.

IT IS SO ORDERED.

Dated this 14 day of February 2006.

/s/ Ann Aiken

Ann Aiken

United States District Judge